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No. 92-1665

In The

Supreme Court of the United States

October Term, 1992

MAPCO AMMONIA PIPELINE, INC., et al.,

Petitioners,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF OF RESPONDENT STATE BOARD OF EQUALIZATION AND ASSESSMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent State Board of Equalization and Assessment restates the Question Presented as follows:

Whether, in order to correct disproportionate taxation of property, a remedy consisting of a refund of the difference between the tax actually levied and the tax which would have been levied if other property unconstitutionally exempted had been taxed satisfies the due process clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners' list of parties to the proceedings is acceptable.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING THE WRIT	5
A. McKesson Is Not Applicable	6
B. The State Court's Decision is Consistent with McKesson	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES CITED:

American Trucking Assns, Inc. v. Smith, 496 U.S. 167 (1990) 13

Amoco Pipeline Co. v. State Bd. of Equal., 242 Neb. 273, 494 N.W.2d 541 (1993) 15

Atchison, T. & S.F. Ry. v. O'Connor, 223 U.S. 280, 285 (1912) 6

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) 11

Bade v. Drachman, 4 Ariz. App. 55, 417 P.2d 689 (1966) 8

Bohn v. Waddell, 167 Ariz. 344, 807 P.2d 1 (Ariz. Tax 1991), vacated on other grounds sub nom. Estate of Bohn v. Waddell, ___ Ariz. ___, 848 P.2d 324 (Ariz. App. 1992), review denied (April 13, 1993), petition for cert. filed (U.S. April 30, 1993) (No. 92-1748) 10, 11

James B. Beam Distilling Co. v. Georgia, ___ U.S. ___, 111 S. Ct. 2439 (1991) 10

Kearney Convention Center v. Buffalo Cty. Bd. of Equal., 216 Neb. 292, 344 N.W.2d 620 (1984) 9

MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991) .. *passim*

MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal., 242 Neb. 263, 494 N.W.2d 535 (1993) .. *passim*

McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990) ..... *passim*

Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991) 3

TABLE OF AUTHORITIES – Continued

Page

Northern Natural Gas Co. v. State Bd. of Equal., 232 Neb. 806, 443 N.W.2d 249 (1989), cert. denied 493 U.S. 1078 (1990) 9

Siegal v. Newark, 38 N.J. 57, 183 A.2d 21 (1962) 8

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) 9

Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974) 3

Thayer v. South Carolina Tax Comm'n, 413 S.E.2d 810 (S.C. 1992) 14

United States v. Estate of Donnelly, 397 U.S. 286 (1970) 10

STATUTES CITED:

28 U.S.C. § 1257 2

Neb. Rev. Stat. § 77-202(6)-(9) (1990) 3, 4, 11

Neb. Rev. Stat. § 77-505 (Cum. Supp. 1992) 2

Neb. Rev. Stat. § 77-801.01 (1990) 2

Neb. Rev. Stat. § 77-802 (1990) 2

Neb. Rev. Stat. § 77-1727 (1990) 7

Neb. Rev. Stat. § 77-1735 (1990) 7

Neb. Rev. Stat. § 77-1736.04 (1990) 7

OTHER CITATIONS:

U.S. Const. amend. XIV 5, 6

Neb. Const. art. VIII, § 1 ..... 3, 4, 5, 7, 8

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OPINIONS BELOW

The opinion of the Nebraska Supreme Court [hereinafter "State Court"] is reported as ***MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal.***, 242 Neb. 263, 494 N.W.2d 535 (1993) *[MAPCO II]*. A previous opinion of the Nebraska Supreme Court in the same case is reported as ***MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal.***, 238 Neb. 565, 471 N.W.2d 734 (1991) *[MAPCO I]*. The

opinions of the State Court are reprinted in the Appendix to the Petition.

JURISDICTION

Petitioners seek to invoke the Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The text of the due process clause of the Fourteenth Amendment is reprinted in the Petition. (Pet. Cert. at 2).

STATEMENT OF THE CASE

Petitioners are four companies which own, maintain, and operate pipeline transmission systems in Nebraska. Petitioners are public service entities whose property is valued for tax purposes by the State Tax Commissioner and equalized by the State Board of Equalization ["State Board"]. Neb. Rev. Stat. §§ 77-801.01, 77-802 and 77-505 (1990 and Cum. Supp. 1992).

In August, 1990, Petitioners appeared before the State Board and requested "equalization" of their property "(1) with railroad rolling stock, which had been exempted from taxation . . . and (2) with center pivot and other irrigation systems used for agricultural purposes and equipment and machinery used for business purposes . . . . " ***MAPCO I,*** 238 Neb. at 567, 471 N.W.2d at 737. The State Board denied Petitioners' requests. ***Id.*** at 568, 471

N.W.2d at 737. On appeal, the State Court reversed. *Id.* at 585, 471 N.W.2d at 747. The State Court declared unconstitutional the redefinition of real property contained in LB 1 (*codified at* Neb. Rev. Stat. § 77-103 (1990)), and reaffirmed its finding in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991) that the exemption of railroad rolling stock in LB 7 (*codified at* Neb. Rev. Stat. § 77-202(11) (1990)) was unconstitutional. 238 Neb. at 570-76, 471 N.W.2d at 738-742. Addressing the relief to which Petitioners were entitled, the State Court rejected Petitioners' claim that they should be "'equalized' at zero percent" because railroad rolling stock was not taxed. *Id.* at 577, 471 N.W.2d at 742. The State Court held that "[t]he process of equalization . . . [could not] be applied to property that is not taxed." *Id.* Thus, the State Court determined that Petitioners' remedy was "not for their property to be 'equalized' at zero percent, but for it to be taxed uniformly and proportionately in compliance with Neb. Const. art. VIII, § 1." *Id.* at 583, 471 N.W.2d at 746.

The State Court continued, noting that, "[i]n their apparent zeal to avoid taxation entirely," Petitioners had not challenged the constitutionality of the tax exemptions contained in Neb. Rev. Stat. § 77-202 (1990). The State Court then went on, *sua sponte*, to hold unconstitutional exemptions for personal property contained in Neb. Rev. Stat. § 77-202(6)-(9) (1990), and overruled its previous decision in *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), which had upheld as legitimate classifications the exemptions for agricultural income-producing machinery and equipment, agricultural products, and business inventories in § 77-202(6)-(9). *Id.* at 581-85, 471 N.W.2d at

744-46. The State Court held that the property tax exemptions in § 77-202(6)-(9) were "unconstitutional under Neb. Const. art. VIII, § 1 in that they prevent the levy of taxes 'by valuation uniformly and proportionately upon all tangible property and franchises.'" *Id.* at 585, 471 N.W.2d at 747. The State Court reversed the order of the State Board, and remanded the cause "with directions to assess the property of the [Petitioners] and equalize its value as required by article VIII, § 1 of the Nebraska Constitution and the applicable statutes." *Id.*

On remand, the State Board remedied the disproportionate taxation of Petitioners property resulting from the determination of the unconstitutionality of the tax exemptions in § 77-202(6)-(9) and (11) by reducing Petitioners' taxable values for 1990 by a percentage calculated by comparison of the total value of tangible property with the total value of property not taxed and declared to be unconstitutionally exempted in *MAPCO I*. This resulted in an order by the State Board reducing Petitioners' unit values for tax year 1990 by 18.81 percent. *MAPCO II*, 242 Neb. at 265, 494 N.W.2d at 537.

On appeal, the State Court affirmed the order of the State Board. *MAPCO II*, 242 Neb. at 267, 494 N.W.2d at 538. The State Court found that the remedy provided by the State Board conformed with the Court's decision in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990), by providing "a refund of the difference between the taxes levied against the property of the [Petitioners] and the taxes which the [Petitioners] would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed."

MAPCO II, 242 Neb. at 266, 494 N.W.2d at 537. The majority opinion further stated:

> We believe the relief ordered by the State Board corrects the disproportionality in the taxation of [Petitioners'] property within the class of all tangible property in compliance with article VIII, § 1 of the Nebraska Constitution and the Due Process Clause of the 14th Amendment to the U.S. Constitution. The actual disproportionality borne by the [Petitioners] is not measured by the fact that certain property escaped taxation, but by the effect of the nontaxation of certain property in relation to the class of all real and personal property. The [Petitioners] have been provided a remedy which assures that they are obligated to pay no more than their fair share of the total property tax burden, which is the amount they would have paid if the State had properly included all property on the tax rolls that should have been taxed.

Id. at 266-67, 494 N.W.2d at 537-38.

REASONS FOR DENYING THE WRIT

As the Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court, the Petition should be denied.

I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.

Petitioners' sole argument as to why the Court should accept this case and reverse the ruling of the State

Court is that the decision below assertedly conflicts with this Court's decision in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990). While the State Court relied on *McKesson*, the Court's decision in that case is not applicable in this case. Moreover, even if *McKesson* is applicable, the remedy provided Petitioners satisfies the due process clause of the Fourteenth Amendment.

A. *McKesson* Is Not Applicable.

In *McKesson*, the Court held that, if a state penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review later, the due process clause requires that the state afford a "'clear and certain remedy' . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." 496 U.S. at 39 (*quoting Atchison, T. & S.F. Ry. v. O'Connor*, 223 U.S. 280, 285 (1912) (footnote omitted)). The tax at issue was an excise tax that gave preferential treatment to beverages manufactured from Florida-grown crops bottled in the state, which was found to discriminate against interstate commerce because of its preference for distributors of local products. The Court found that the remedy to distributors for having to pay taxes higher than those paid by favored competitors could consist of a refund of the excess tax paid by distributors; a retroactive assessment of the tax on favored competitors; or a combination of a partial refund and a partial retroactive assessment. *Id.* at 39-41.

While relied upon by the State Court, *McKesson* is distinguishable from the case at bar. First, while Petitioners characterize the proceedings below as "refund actions" seeking post-payment recovery of taxes (Pet. Cert. at 2, 8), the claims raised by Petitioners before the State Board sought equalization of the valuations of Petitioners' property. While Nebraska law in effect at the time Petitioners asserted their equalization claims provided procedures for taxpayers to maintain refund actions following payment of property taxes on grounds of illegality or unconstitutionality, Neb. Rev. Stat. §§ 77-1735 and 77-1736.04 (1990), Petitioners did not proceed in this manner. In addition, at that time, Nebraska law permitted the enjoining of property taxes "levied or assessed for illegal or unauthorized purpose[s]." Neb. Rev. Stat. § 77-1727 (1990). While the reduction in Petitioners' valuations by the State Board will ultimately translate into a refund of excess taxes paid, the proceedings in this case do not involve a post-payment refund action, as alluded to by Petitioners.

Second, unlike *McKesson*, the State Court did not hold that the taxes imposed on Petitioners' property were unconstitutional. Rather, the State Court held that various exemptions provided under Nebraska law were unconstitutional as violating the uniformity requirement of Neb. Const. art. VIII, § 1. The court below recognized that, in light of its decision, Petitioners' "unitary value, including both real and personal property, might need to be adjusted so as to achieve uniformity and proportionality of taxation in compliance with" art. VIII, § 1, *MAPCO I*, 238 Neb. at 579, 471 N.W.2d at 743, and remanded the case to the State Board "with directions to

assess the property of the [Petitioners] and equalize its value as required by article VIII, § 1, of the Nebraska Constitution and the applicable statutes." *Id.* at 585, 471 N.W.2d at 747. The remedy provided was to adjust Petitioners' valuations so as to take into account the effect of the unconstitutionally exempted property on the class of all tangible property subject to equalization under the State Constitution. ***MAPCO II,*** 242 Neb. at 266-67, 494 N.W.2d at 537-38. The State Court found "[t]he relief ordered by the State Board correct[ed] the disproportionality in the taxation of [Petitioners'] property within the class of all tangible property in compliance with article VIII, § 1 of the Nebraska Constitution. . . . " *Id.* at 266, 494 N.W.2d at 537.

The proceedings below thus involved the remedy to be provided for disproportionate taxation of property under the State Constitution resulting from a judicial declaration that certain tax exemptions were unconstitutional. The tax imposed on Petitioners' property, however, was not declared unconstitutional. The measure of relief approved by the State Court is similar to that which has been accepted and adopted in other jurisdictions where disproportionate assessments of property are established. *See Bade v. Drachman,* 4 Ariz. App. 55, ___, 417 P.2d 689, 697 (1966) (relief from overassessment of property "is to be taxed only to the extent of a fair share of the tax burden. . . . "); *Siegal v. Newark,* 38 N.J. 57, ___, 183 A.2d 21, 23 (1962) (remedy provided to taxpayer for overassessment of property is "a reduction of his assessment to the 'common level' of assessments in the taxing district."). The State Court's determination of the remedy

required to cure the violation of the uniformity requirement of the State Constitution presents a remedial issue different than that addressed by the Court in *McKesson*.[1]

Third, while Petitioners downplay the significance of the Commerce Clause violation in relation to the Court's discussion in *McKesson* of the options available to the

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[1] Petitioners argued below that the remedy provided was inconsistent with Nebraska Supreme Court decisions addressing the remedy required when certain taxable property within a class is undervalued in comparison with the value placed on other property in the same class. Those cases involved a remedy for failure to equalize valuations of property in the same class by reducing or lowering the value of the complaining taxpayer's property to the level at which the lower valued class or type of property was taxed. *E.g., Kearney Convention Center v. Buffalo Cty. Bd. of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *see also Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923). As the State Court properly determined, however, "equalization" relief of this nature was inappropriate, as "[t]he process of equalization . . . cannot be applied to property that is not taxed." *MAPCO I*, 238 Neb. at 577, 471 N.W.2d 742. None of the precedents relied upon by Petitioners dealt with the relief to be provided taxpayers due to the overassessment of property resulting from exemptions later declared unconstitutional.

Petitioners also assert that the State Court would have reached the same result employed in its prior equalization cases by applying the equal protection clause of the Fourteenth Amendment, referencing the State Court's prior decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078 (1990). (Pet. Cert. at 9-10). This ignores the fact that the State Court's decision that the exemptions in Neb. Rev. Stat. § 77-202(6)-(9) were unconstitutional was grounded solely on the State Constitution, and that the State Court specifically repudiated "any language" in its *Northern* opinion regarding the applicability of "equalization" principles in this case. *MAPCO I*, 238 Neb. at 577, 471 N.W.2d at 742.

State of Florida to provide a remedy in compliance with due process, the Court's decision reveals that it "felt that McKesson's injury flowed, not from the fact that it had to pay more than the favored taxpayers, but from the fact that as a result it experienced and suffered an economic disadvantage because the favored taxpayers were commercial competitors." ***Bohn v. Waddell,*** 167 Ariz. 344, 351, 807 P.2d 1, 8 (Ariz. Tax 1991), ***vacated on other grounds sub nom. Estate of Bohn v. Waddell,*** ___ Ariz. ___, 848 P.2d 324 (Ariz. App. 1992), ***review denied*** (April 13, 1993), ***petition for cert. filed*** (U.S. April 30, 1993) (No. 92-1748). The Court was concerned with the "relative disadvantage" imposed on certain distributors, noting that, absent a remedy which placed McKesson in "the position actually occupied by [McKesson's] favored competitors," the Commerce Clause violation would be perpetuated. ***McKesson,*** 496 U.S. at 42. This circumstance is not present in the instant action.

Finally, Justice Souter's opinion in the Court's later decision in ***James B. Beam Distilling Co. v. Georgia,*** ___ U.S. ___, ___, 111 S. Ct. 2439, 2448 (1991), suggests that courts may exercise remedial discretion in cases in which new rules are retroactively applied. In remanding ***Beam*** to the state court, Justice Souter noted that the court could consider "reliance interests entitled to consideration" in fashioning appropriate relief, "a matter with which ***McKesson*** did not deal." ***Id. (citing United States v. Estate of Donnelly,*** 397 U.S. 286, 296 (1970) (Harlan, J., concurring)). Such reliance interests are plainly present in this case. ***MAPCO I*** overturned a 1974 decision of the Nebraska Supreme Court which had upheld the validity

of the exemptions in § 77-202(6)-(9), "thereby dramatically and essentially changing the previous and long-standing view of the Legislature's tax exemption power. . . . " *MAPCO II*, 242 Neb. at 270, 494 N.W.2d at 540 (Shanahan, J., dissenting). The State Court properly fashioned meaningful relief by adjusting Petitioners' unit valuations to assure that, in light of the unexpected and unanticipated declaration of the invalidity of exemptions previously granted, Petitioners were "obligated to pay no more than their fair share of the total property tax burden. . . . " *MAPCO II*, 242 Neb. at 267, 494 N.W.2d at 537.[2]

In light of these distinctions, while the State Court relied on *McKesson*, the Court's decision in that case is not, in fact, controlling in this action. Based on these differences, the Court should decline to grant Petitioners'

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[2] *McKesson* is distinguishable for a further reason. Although Florida contended the invalidity of its tax was not "clearly foreshadowed" by prior Supreme Court decisions, it is apparent that the Court considered the Florida scheme as nothing but "a thinly veiled attempt to retain in place a tax scheme that had been invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). *McKesson*, 110 S.Ct. at 2255." *Bohn v. Waddell*, 807 P.2d at 8. While "Florida should have known that its scheme was a constitutional violation," *id.*, Nebraska could not have known that the State Court would, *sua sponte*, invalidate exemptions which it had previously found constitutional. Indeed, if the State Court erred, it was wrong in *MAPCO I* by giving retroactive effect to its decision, as opposed to giving its decision only prospective effect. *MAPCO II*, 242 Neb. at 267-271, 494 N.W.2d at 538-90 (Shanahan, J., dissenting). Petitioners can hardly complain that the State has given them no "meaningful backward-looking relief," *McKesson*, 496 U.S. at 31, when, under established federal constitutional principles, no retroactive relief was required.

request for plenary review based on the alleged "misapplication" of *McKesson* by the State Court.

B. The State Court's Decision is Consistent with McKesson.

The State Court, in assessing the propriety of the remedy provided Petitioners by the State Board, did evaluate the relief granted in light of this Court's decision in *McKesson*. The State Court stated that, in *McKesson*,

> [t]he Court noted that the State might choose to erase the property deprivation by providing the taxpayer with a full refund of the tax payments, or the State could cure the invalidity by refunding the difference between the tax paid and the tax which would have been paid if all taxpayers had been treated equally. Alternatively, the Court held that the State might assess and collect back taxes from taxpayers who had received unlawful benefits or it might utilize a combination of partial refunds and partial retroactive assessments of tax increases.

MAPCO II, 242 Neb. at 266, 494 N.W.2d at 537.

The State Court concluded that "[t]he remedy which the State Board selected in this case conforms to the second method – a refund of the difference between the taxes levied against the property of the [Petitioners] and the taxes which the [Petitioners] would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed." *Id.*

Petitioners assert that the remedy approved by the State Court contravenes an alleged "core equalization

requirement" between favored and disfavored taxpayers. (Pet. Cert. at 7-8). Petitioners further claim that the relief granted "is substantively identical to the 'hypothetical scheme' specifically rejected in *McKesson*." (Pet. Cert. at 9). Petitioners are wrong on both counts.

First, as noted previously, the Court's emphasis in *McKesson* on the need for the relief provided to place McKesson in the same position as the favored taxpayers was rooted in the fact that such a remedy was necessary to cure the competitive disadvantage placed on the taxpayer by the favored tax treatment accorded its competitors. It is this element of competitive disadvantage and desire to remedy the underlying Commerce Clause violation that lies at the heart of the Court's discussion in *McKesson* of the types of retroactive relief required by the due process clause to cure a constitutional violation of this nature. This circumstance does not, of course, exist here.

If McKesson is applicable, the remedial approach approved by the State Court does, in fact, satisfy the standards set forth in that case "by refunding to [Petitioners] the difference between the tax [they] paid and the tax [they] would have been assessed" if the property exempted under the statute declared unconstitutional had been taxed. *McKesson,* 496 U.S. at 40. *See also American Trucking Assns, Inc. v. Smith,* 496 U.S. 167, 206n.2 (1990) (*McKesson* "makes clear that the Federal Constitution does not **require** the State to refund the entire tax that was unconstitutionally exacted from petitioners, but only to refund the discriminatory portion or otherwise adjust the tax to render it non-discriminatory.") (Stevens, J., dissenting) (Emphasis in original)). This is precisely

what the remedy approved by the State Court does. It provides Petitioners with a refund of the excess tax paid resulting from the effect of the State Court's declaration of the unconstitutionality of certain tax exemptions in relation to the class of all tangible property. This remedy "assures that [Petitioners] are obligated to pay no more than their fair share of the total property tax burden, ..." *MAPCO II*, 242 Neb at 267, 494 N.W.2d at 537. *McKesson* requires the State to do no more.

Petitioners' further claim that the relief provided is no different than the "hypothetical tax scheme" rejected in *McKesson* is equally misplaced. There is nothing "hypothetical" about the relief provided to Petitioners. Unlike the "hypothetical tax scheme" rejected in *McKesson*, which resulted in no remedy at all, the remedy approved by the State Court results in actual relief in the form of a reduction of the taxable values of Petitioners' property, which, in turn, will result in refunds of the excess taxes paid by Petitioners due to the nontaxation of unconstitutionally exempted property. The relief afforded Petitioners constitutes "meaningful backward-looking relief . . . ," *McKesson*, 496 U.S. at 31, and is consistent with other decisions addressing the relief to be provided for the overassessment of property. *See Bade v. Drachman*, 4 Ariz. App. 55, 417 P.2d 689 (1966); *Siegal v. Newark*, 38 N.J. 57, 183 A.2d 21 (1962).[3]

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[3] Petitioners contend the South Carolina Supreme Court's decision in *Thayer v. South Carolina Tax Comm'n*, 413 S.E.2d 810 (S.C. 1992), represents another "blatant refusal" by a state court to honor *McKesson*, which "should not go unchecked." (Pet. Cert. at 10-11). Whatever else may be said about *Thayer*, it is clear that the State Court, in this case, did not deny Petitioners

Finally, while Petitioners assert that "[t]his case involves a clear-cut misapplication of the decision in *McKesson*" (Pet. Cert. at 2), it is noteworthy that forty-six other taxpayers presenting equalization claims to the State Board were provided the identical relief as that afforded Petitioners, which relief was approved by the State Court in a companion case to *MAPCO II*. *Amoco Pipeline Co. v. State Bd. of Equal.*, 242 Neb. 273, 494 N.W.2d 541 (1993). None of these taxpayers sought review of the State Court's decision by petition for a writ of certiorari. If the State Court's decision constitutes a "blatant" and "clear-cut" misapplication of *McKesson*, it is difficult to understand why none of the taxpayers provided the same relief as Petitioners have challenged the State Court's action. In actuality, the absence of a similar challenge by any of these taxpayers reflects their understanding of the propriety of the State Court's decision.

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retrospective relief. To the extent *McKesson* is applicable, the State Court provided Petitioners all the relief to which they are constitutionally entitled.

CONCLUSION

Petitioners' request for summary reversal, as well as their request that the petition be granted, should be denied.

STATE BOARD OF EQUALIZATION
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